

MR A.P.P. DAVE, A.P.P. for Respondent.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 28/04/98

ORAL COMMON JUDGEMENT.

This appeal (Cri. Appeal No. 789 of 1994) has been directed against the impugned judgment and order dated 24th June, 1994 rendered by the learned Additional Sessions Judge, Valsad at Navsari in Sessions Case No. 103 of 1991. Criminal Appeal No. 707 of 1994 appears to have been preferred through the jail and has been kept with this appeal with no orders (regarding admission). Reference has, therefore, been made to Criminal Appeal No. 789 of 1994 as substantive appeal.

2. Appellants are referred to as the accused or the accused persons by their respective numbers in the aforesaid Sessions Case which they faced. Initially, the accused persons were charged with the offences punishable u/s 397, 398 and 394 r/w Sec. 114 of the Indian Penal Code (IPC for short) and u/s 135 of the Bombay Police Act. That was Cri. Case No. 1517 of 1991 before the learned J.M.F.C., Pardi. He committed the case before the Sessions Court. It was then given Sessions case no. 103 of 1991. The charge was framed at exh. 1. Upon the accused persons pleaded not guilty to the charge the matter was kept for hearing on 4th September, 1992 and 5th September, 1992. Some witnesses were examined. However, subsequently the accused persons pleaded guilty. Hence, as per the judgment exh. 25 rendered by the Trial Court they were sentenced. The State filed appeal for enhancement of the sentence before this Court by way of filing Criminal Appeal No.1116 of 1993. As per the decision of this Court rendered on 22nd June, 1993 the matter was remanded for fresh trial from the stage where it was left. Accordingly, the evidence was recorded before the learned Additional Sessions Judge. Upon the conclusion of the evidence, further statement of the accused persons were recorded u/s 313 of the Cri. Pro. Code, 1973 (II of 1974). After hearing both the sides the learned Additional Sessions Judge convicted the accused persons of the offences punishable u/s 397-398 r/w/s 114 of the IPC. They were acquitted of the offence punishable u/s 394 r/w/s 114 of the IPC. The substantive sentence which was directed to run concurrently was rigorous imprisonment for seven years for all the accused persons. The learned Additional Sessions Judge directed set off being given for the under trial period. That precisely is the decision under challenge in this appeal.

3. The facts of the prosecution case as emerging from the complaint being I. CR. 51/91 lodged on 16th

April, 1991 by the prosecution witness no. 1 Afak Abdul Aziz Mohid might be noted in brief:

4. The complainant has been residing with his family and has Motor Service Station known as Auto Clean Service Station. His younger brother Muzammil and his wife Masum, another younger brother Zahur and his two daughters and his younger brother's son were residing with the complainant. Domestic servants were also residing in the house. On the date of the incident namely on 16-4-1991 itself, except Muzammil who went to Valsad in Maruti car, all in the family were present at home. They were watching television at 7-00 O'clock in the evening. At that time, one Jatinbhai and his wife as also one Monaben friend of Masum had been to the house of the complainant. The servants were also there in their room at the back side of the house. Monaben was on the first floor of the house. The main entrance door of the house was open. Four persons with the weapons like sword, "Gupti", Rampuri knife and "Koita" (instrument having wooden handle and having one side sharp blade, smaller near the handle than the upper portion and normally used for cutting sugarcane) entered the house through the open door of the drawing room. Pointing "Gupti" at the throat of Zahurbhai, threats were administered in Hindi language, saying that if any one shouted, they would be killed. All who were present then, were accordingly made to sit on the sofa. One of the accused persons closed the door from inside. The accused person having sword took the complainant to the upper floor of the house and asked him to open the cupboard. Two wrist watches, cash in the sum of Rs.. 4,000/-, two ladies wrist watches, gold plated silver necklace and three rings were taken out and placed in the bag. Thereafter, the complainant and Monaben were brought back to the ground floor. The complainant was asked to disconnect Video Cassette Recorder(VCR) and after the same was disconnected it was placed in the bag. One accused who had knife in his hand moved with Zahur and searched the cupboard and other things. One of the two remaining accused took out "Mangalsutra", pair of earrings from the person of the complainant's wife Nasimben. From the person of Masumben golden chain and one bangle were taken out. From the person of Jatinbhai wrist watch was taken out. When the accused persons were engaged in committing the crime as aforesaid, the servants entered the house through the back door. They were also made to sit down. In the meantime, the accused who had sword with him stated in Hindi language to the effect that they were going and if any one shouted they would be killed. Saying so, he cut off the telephone

wire. The accused person having Rampuri knife informed the complainant to go near back side door. He then opened the door abutting the kitchen. He saw the police with rifle. The accused person armed with Rampuri knife immediately started to run away. But the police caught hold of him. The accused person armed with "Koito" tried to assault the police as a result of which the police had fired on his right leg. He, therefore, fell down on the "Otta" of the kitchen. The accused person armed with "Gupti" was in the kitchen and the police caught him red handed from there.

5. In the aforesaid process, only one accused person managed to escape (he is accused no. 3 Amrut Ukadbhai Patel). When the names of the accused persons were asked, the accused person who was having Rampuri knife in his hand stated that his name was Lawrence Christian. The accused person who was armed with "Koito" gave his name to be Ashok Chhaganlal. The accused person who was armed with "Gupti" gave his name to be Bipinbhai Chandrakant Chauhan and the accused person who was armed with sword was Amrut Ukadbhai Patel, as per the particulars of his name and description supplied by the other accused persons.

6. Muzammil informed that on his return from Valsad he peep through the window of the drawing room of the house and on seeing robbers in the process of committing robbery in the house he immediately rushed to the police station and informed P.S.I. Mr. Brahmabhatt about the same. With the result, the P.S.I. and persons of police party immediately rushed to the scene of offence. Thus, the accused persons were caught red handed in the process of committing the offence of robbery. The only one person as aforesaid had managed to escape. It has further been the case of the complainant that thereafter the police had taken away the accused persons and the complainant had received one golden chain, one golden bangle, one V.C.R., two citizen wrist watches, one gold plated silver necklace, one golden ring from the accused persons. He has also stated that the accused who managed to escape had taken away with him one "Mangalsutra", one pair of earrings, wrist watch of Jatinbhai, Rs.. 4000/cash, two ladies wrist watches and two golden rings.

7. The accused persons who were arrested by the police had injuries on their person and they were forwarded to the Medical Officer. All these accused persons were admitted as indoor patients. Accused No. 3 Amrut Ukadbhai Patel was arrested from Bombay.

8. After investigation was completed and the charge sheet was filed, the case was committed to the Sessions Court. After conclusion of the trial as aforesaid, the accused persons faced their conviction and sentence at the hands of the learned Additional Sessions Judge as per the impugned judgment and order. That is how the accused persons are before this Court.

9. After reading the impugned judgment learned advocate appearing for the appellants made three fold submissions. In the first place, identification parade of the accused no. 3 Amrut Ukadbhai Patel was not held and when it has been brought on record from the evidence of Pandit Ghumarubhai P.W. No. 7 exh. 34 that all the accused persons had covered their faces at the time of commission of the offence and the accused no. 3 Amrut Ukadbhai Patel had escaped and the police had cordoned them at the time of commission of the offence, there was no material for connecting the accused no. 3 Amrut Ukadbhai Patel with the crime. Thus, in absence of test identification parade, it cannot be said that the offences charged against the accused no. 3 were established beyond reasonable doubt. In the second place, it has been submitted that it can also not be said that recovery of muddamal articles was established beyond reasonable doubt so as to connect the accused no. 3 Amrut Ukadbhai Patel with the offences charged against him. It has finally been submitted that the accused no. 4 was below 21 years of age and therefore the learned Additional Sessions Judge has erred in not giving benefit of probation u/s 6 of the Probation of Offenders Act, 1958. In reply, it has been submitted by the learned A.P.P. for the State that the evidence placed on record as considered by the learned Additional Sessions Judge at length would clearly establish guilt of the accused no. 3 Amrut Ukadbhai Patel beyond reasonable doubt and that the age of the accused no. 4 Ashokbhai Chhaganbhai has not been clearly shown to be below 21 years at the time of commission of the crime.

10. Before the submissions made on behalf of the rival sides are considered a brief resume of the evidence placed on record before learned Additional Sessions Judge might be made.

11. The witnesses who were virtually victims of the offences in question are four in number:

(i) Afak Abdul Aziz Mohid (complainant) exh. 28.

(ii) Zahurbhai Abdul Aziz (complainant's brother)
exh. 33.

(iii) Muzammil Abdul Aziz (complainant's brother)
exh. 36.

(iv) Jatinbhai Amaratbhai Desai (complainant's
friend) exh. 39.

The medical evidence in the form of oral
testimony of Dr. Jashwantbhai Mangaldas Patel exh. 29
has been recorded in support of the facts of the
prosecution case regarding the injuries sustained by the
concerned accused persons.

There is evidence of an independent witness
Balvantsinh Ramsing More, exh. 40.

12. Following pancha witnesses have been examined by
the prosecution.

(i) Tahirhusein Attarhusein Ansari, exh. 30.

(ii) Munafbhai Yusufbhai Boga, exh. 31.

(iii) Vijaybhai Laxmanbhai, exh. 32.

(iv) Kasambhai Mahmadbhai Mulla, exh. 35.

(v) Firojbhai Salimbhai, exh. 37.

The police persons who were examined before the
learned Additional Sessions Judge are as follows :

(i) Pandit Ghumarubhai, exh. 34 (Police Jamadar).

(ii) Sanjubhai Kamalkar Ambegaokar, P.S.I. exh. 41.

(iii) Dilipkumar Ambavat Brahmabhatt, P.S.I. exh. 42.

The prosecution placed on record the following
documents which have been received in the evidence at the
relevant stage of the evidence :

(i) The complaint exh. 8.

(ii) panchanama of person of the accused no. 4 Ashok
Chhaganbhai, exh. 9.

(iii) Panchanama of scene of offence exh. 10.

(iv) Panchanama of seizure of muddamal articles
exh. 11.

(v) Another panchanama of seizure of muddamal
articles, exh. 12.

(vi) Panchanama of muddamal recovered from gold smith
exh. 13.

(vii) Medical Certificate of accused no. 1
Bipinchandra Chandrakant Chauhan, exh.14.

(viii) Medical Certificate of the accused no. 2
Lawrence Christian, exh. 15.

(ix) Medical Certificate of the accused no. 4 Ashok
Chhaganlal exh. 16.

13. On appreciation of the evidence adduced before him, the learned Additional Sessions Judge has come to the conclusion that the accused persons came to be cordoned and caught red handed at the time of commission of the offences and except the accused no. 3 Amrut Ukadbhai Patel all other three accused persons were apprehended red handed at the place of the incident while committing the offences as stated above. They had disclosed their names and particulars in presence of the complainant as deposed to by the complainant and other witnesses. Although they are stated to have covered their faces at the time of commission of the offences, their faces were not covered right at the time when they were apprehended at the scene of offence. Respective panchanamas with regard to recovery of the muddamal articles and the weapons of the offence lend support to the prosecution case as narrated by the respective witnesses. Having gone through the evidence adduced before the learned Additional Sessions Judge, it was found that it is quite difficult to assail conviction and sentence in so far as the accused no. 1 Bipinchandra Chandrakant Chauhan and accused no. 2 Lawrence Christian were concerned. It was also difficult to assail the conviction and sentence of the accused no. 4 Ashok Chhaganbhai. However, in so far as the sentence is concerned, submissions were made with regard to giving benefit of probation to him. In so far as the accused no. 3 Amrut Ukadbhai Patel is concerned, the submissions as aforesaid were made. Making reference to the evidence of P.W. No. 7 Pandit Ghumaru Exh. 34, it has been submitted that right upto the time when the police cordoned the accused persons at the place of the incident, his face was covered and there was no question

of his identity having been disclosed at the place of the incident. It has also been shown from the evidence that no test identification parade was held in so far as he was concerned. No test identification has also been held with regard to muddamal articles alleged to have been recovered from his house at Bombay. Hence, it has been submitted that the offences charged against him could not have been said to have established beyond reasonable doubt. In support of these submissions concerning the accused no. 3 Amrut Ukadbhai Patel reference has been made to the decisions of the Apex Court in the case of Ramkishan Mithanlal Sharma and others Vs. State of Bombay, reported in AIR 1955 SC 104 and in the case of Rameshwar Singh Vs. State of Jammu & Kashmir, reported in AIR 1972 SC 102. It is no doubt true that before rendering conviction against particular accused who was unknown to the eye witness at the time of commission of the offence, it would be necessary for the prosecution to establish his connection with the crime and for that purpose ordinarily test identification is held. However, it is a settled law that the identification by the concerned witness at the time of the trial would be substantive piece of evidence and such identity of the accused for being connected with the crime might be established from the chain of the circumstances disclosed from the prosecution evidence. The purpose of holding test identification parade is to enable the witness to identify the properties which are the subject matter of the offence or to identify the persons who are concerned with the offences. (See the case of Ramkishan Vs. State of Bombay supra)

14. In the present case, the facts clearly indicate that the three accused persons who were apprehended at the very scene of offence while committing the crime disclosed not only their names and particulars but also the name of the accused no. 3 Amrut Ukadbhai Patel and his description. It has also appeared in the prosecution evidence more particularly the evidence of the complainant exh. 28 that the address of this accused was also disclosed at that very point of time. In that view of the matter, the complaint could be given on the same day naming all four accused persons leaving the question of holding test identification parade in the back ground. However, the investigating agency has not remained silent about the accused no. 3 whose case has been presented before this Court. As stated above, the investigating agency had an occasion to take the remaining accused persons to Bombay for the purpose of carrying out search of the house of the accused no. 3 in the presence of the panchas which were taken from Bombay itself. Even the

Bombay police accompanied the search party. Upon search having been carried out in the presence of the accused no. 3 at his house the muddamal articles described in the panchanama exh. 11 were found. Upon verifying the muddamal articles set out in exh. 11 panchanama with the articles/ornaments stated in the complaint exh.8 it clearly appears that the oral evidence which was placed before the learned Additional Sessions Judge clearly gets support. The complainant had an occasion to identify the muddamal articles/ornaments as per the panchanama exh. 12 in presence of the panchas and that also would lend support to the oral evidence of the complainant as also the evidence of the other witnesses so as to connect the accused no. 3 with the crime in question. The pancha witnesses have been examined in support of the panchanamas. Thus, it cannot be said that the prosecution has failed to adduce the evidence so as to connect accused with the offences in question. In my opinion, the facts of the present case as appearing in the prosecution story, noted hereinabove and discussed at length by the learned Additional Sessions Judge clearly go to indicate that the guilt of the accused no. 3 as alleged against him has been established beyond reasonable doubt. There is no material drawback or flaw, in the back ground of the facts of this case, that would rescue the accused no. 3. Hence, the submissions made in support of the accused no. 3's case cannot be accepted.

15. Reference then has been made to the further statement of the accused no. 4 Ashok Chhaganbhai for canvassing his case on the question of sentence. It is no doubt true that in the further statement of the accused no. 4 Ashok Chhaganbhai his age has been recorded as 21 years. This further statement was recorded on 5th September, 1992. His plea was recorded on 14th August, 1992 and his age was noted to be 22 years. From this evidence, it has been submitted that this accused must be of less than 21 years of age when the offence was committed on 16th April, 1991. Hence, making reference to the decision of the Apex Court in the case of Masarullah Vs. State of Tamil Nadu, reported in AIR 1983 SC 654 benefit of probation u/s 6 of the Probation of Offenders Act, 1958 has been claimed. In reply, Mr. S.P. Dave, learned A.P.P. for the State has made reference to the charge sheet submitted on 8th July, 1991 where also the accused no. 4 Ashok Chhaganbhai has been shown to be 22 years of age. Hence, it has been submitted that he was not less than 21 years of age on the date of incident namely 16th April, 1991. It has been further submitted on behalf of the State that even

on the date of his arrest accused no. 4 Ashok Chhaganbhai was shown to be 22 years of age. Thus, the age of this accused no. 4 Ashok Chhaganbhai has not been clearly set out before the Court. Besides, at the time of making submissions on behalf of the accused persons claim of benefit of probation was not canvased. Thus, the age of the accused no.4 Ashok Chhaganbhai has not been shown to be below 21 years from any material. In my opinion, there is great deal of force in the submissions made by Mr. S.P. Dave, learned A.P.P. for the State. In the absence of any material to show that the accused no. 4 Ashok Chhaganbhai was below 21 years of age on 16th April, 1991 when the offences charged against him were committed, there is no question of applying Section 6 of the Probation of Offenders Act, 1958. Hence, the submissions made in that respect on his behalf cannot be accepted.

16. In the result, this appeal must fail and the same is accordingly dismissed. Other appeal No. 707/94 will also stand disposed of accordingly.

-0-0-0-0-0